

AZ CAREER PROSECUTOR COURSE

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Phoenix, Arizona



Cross Examination: “Fortiter in re, suaviter in modo”

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CROSS EXAMINATION

“Fortiter in re, suaviter in modo”

(Do what must be done without hesitating, but accomplish it without offending)

WHY DO PROSECUTORS STRUGGLE WITH CROSS?

- Most of our experience is cross-examining criminal defendants or their friends/family members – who are not limited by the truth.
- We haven't been properly trained on how to approach it.
- Lack of opportunities.

DEFENSE DIRECT EXAM OF DR. STREED

Defense Attorney: Isn't it true that it is improper for a detective to lead someone they are interviewing by giving them the answer?

Me: Objection leading.

Judge: Sustained.

HOW WE PREPARE OR APPROACH CROSS EXAMINATION

- We don't because we don't know what the witness is going to say.
- The Defendant is lying so just get them talking as much as possible because eventually they will show themselves to be a liar.
- Go thru the various points made by the witness on direct and ask questions to show why the points are false.

MISCONCEPTIONS ABOUT CROSS-EXAMINATION

- Cross Examination is an art, not a science.
- Never ask a question you don't know the answer to.
- Never ask an open-ended question
- Cross-examination should bounce around to keep the witness off balance so they can't keep track of their lies.

GENERAL RULES OF CROSS EXAMINATION

1. Be brief.
2. Use plain words.
3. Use mostly leading questions.
4. Be prepared
5. Listen
6. Do not quarrel
7. Avoid repetition
8. ~~Disallow witness explanation~~
9. ~~Limit questioning~~
10. ~~Save for summation.~~

IDENTIFY THE DEFENSE

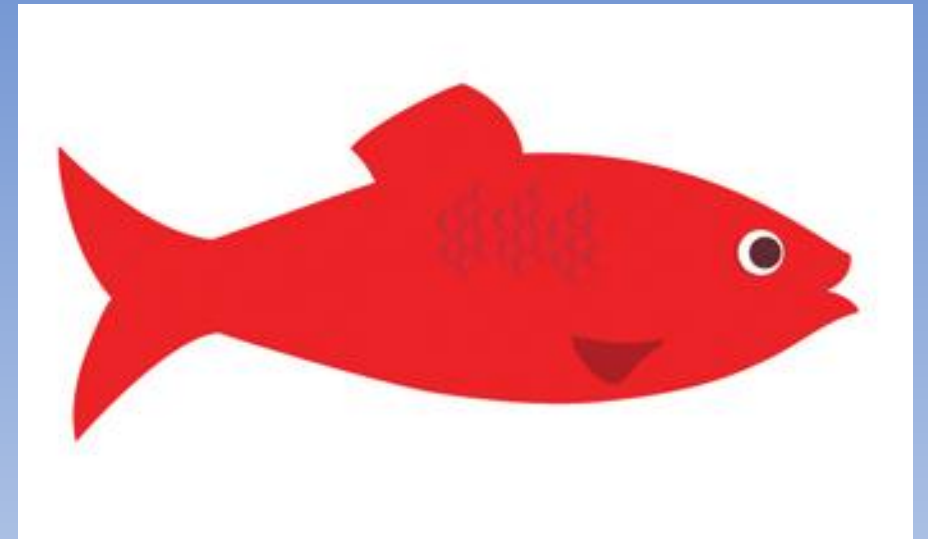
Why is this particular witness being called?

RED HERRING DEFENSE

DEFENSE THAT IF BELIEVED = ACQUITTAL

RED HERRING DEFENSES

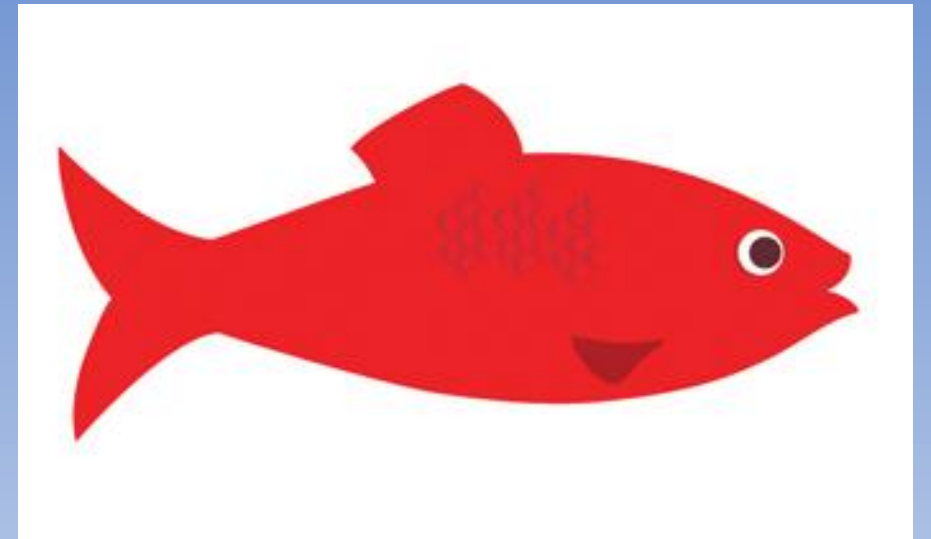
- Defenses that do not legally entitle the Defendant to an acquittal.
- Defenses that distract you and cause you to attack the witness and miss out on opportunities to advance your theory.
- Examples: Defendant is a good person; Victim is a bad person; Cops are bad people.



RED HERRING DEFENSES

GOAL =

GET THE JURY TO UNDERSTAND THAT
THIS WITNESS DOES NOT IMPACT THE
DETERMINATION OF GUILT/INNOCENCE



DEFENSES THAT DEMAND AN ACQUITTAL IF BELIEVED

If the Defendant committed the crime he is charged with then this defense has to be a lie.

Examples: Alibi, Self-Defense, Lack of Culpable Mental State, 3rd Party Defense



DEFENSES THAT DEMAND AN ACQUITTAL IF BELIEVED

GOAL =

SHOW THAT THIS WITNESS IS A LIAR OR WRONG



CLASSIFY THE WITNESS

HIGH IMPACT HIGH CREDIBILITY	HIGH IMPACT LOW CREDIBILITY
LOW IMPACT HIGH CREDIBILITY	LOW IMPACT LOW CREDIBILITY

LOW IMPACT / LOW CREDIBILITY





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Do you believe in unicorns?

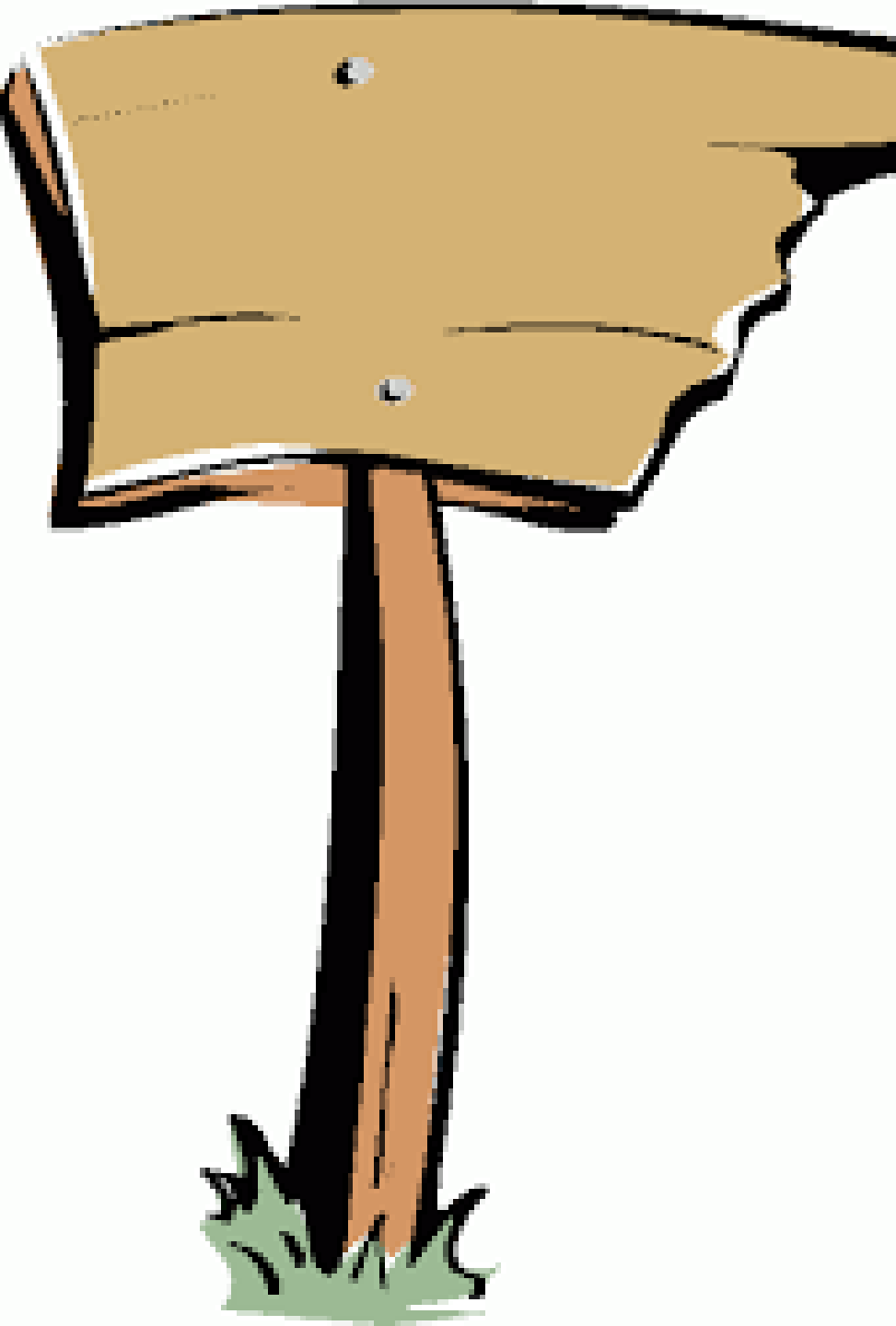
LOW IMPACT / HIGH CREDIBILITY

- Our job on cross is to show that their testimony doesn't really matter as to the issue of guilt.
- This is a witness we can kidnap.
 - What information do they have that can help us advance our theory
 - Don't attack the witness if the witness only helps you.
- This classification can change mid-testimony.

HIGH IMPACT / LOW CREDIBILITY

Two part attack on this type of witness:

- 1) Get concessions from them that will advance your theory/theme of the case.
- 2) Attack them – Demonstrate for the jury the reasons why this witness is lying.



THE SIGN POST

A way to help the jury understand why you are asking the witness this particular series of questions

Chad Norris Accused of Killing Tempe Business Co-Owner; Cops Find Loads of Alleged Evidence but No Body

FRIDAY, SEPTEMBER 21, 2012 AT 8:27 A.M.
BY [MATTHEW HENDLEY](#)



Theory of the Case

Defendant shot the victim to death in the break room of the business on Friday late afternoon in order to take over sole ownership of the company and then used the weekend to cover up the crime scene and get rid of the body.

Theme

This is a case about the Defendant's decision to eliminate the one and only person in the way of him taking over complete control of his business and his attempt to eliminate all evidence of the crime including the victim himself.

DEFENDANT'S DIRECT EXAM TESTIMONY

- Was alone with the victim when the business closed Friday afternoon.
- He and the victim left the business at the same time.
- He never saw the victim again.
- Didn't kill the victim
- Doesn't know who killed him or whether he was killed
- He doesn't know who repaired the bullet holes in the wall to his office/break room
- He had no idea that his trailer that he was pulling contained what it contained







GENERAL GUIDELINES

- Every point you attempt to make in cross examination should either advance your theme/theory of the case or go towards demonstrating that the witness lacks credibility.
- Your cross should be generally formulated before the witness testifies on direct.
- Always think about what opportunities this witness might be offering that we can take advantage of (Cross not limited to scope of direct)

THE DEFENDANT

(high impact / low credibility)

1. Demonstrate why it is that the Defendant has been able to so effectively come up with a story that miraculously explains away every piece of evidence.
2. Get out concessions.
3. Establish points that show the Defendant is lying or points that help advance your theme/theory.

CONCESSIONS



CONCESSIONS

- Defendant and victim were in the business alone on Friday afternoon
- Defendant and victim were alone in the break-room of the business.
- Defendant owned an XDM 9 mm handgun (same caliber as murder weapon)
- The XDM 9 mm handgun was at the business that Friday afternoon.

DEFENDANT'S TESTIMONY

POINTS TO ADVANCE THEME AND/OR SHOW DEFENDANT LYING

- Defendant/victim had recently not been getting along.
- If victim died, Defendant would become sole owner of the company.
- One of the stores you indicated you went to on Saturday at 9:00 am didn't even open until 10:00 am
- You don't have the name/number of the person who you were supposedly delivering the trailer to.

Gun Safe



CONTROLLING THE RUNAWAY WITNESS

TECHNIQUES THAT DO NOT WORK

1. “Just answer my question yes or no”
2. Asking the judge for help

TECHNIQUES THAT DO WORK

1. “So your answer is yes”
2. Ask, repeat, repeat
3. Ask, repeat, reverse
4. Non-responsive objection
5. The hand

DEALING WITH THE “I DON’T KNOW” OR “I DON’T REMEMBER” WITNESS

Demonstrate that the witness is able to remember details both before and after the event for which they claim to not remember.

Demonstrate that the witness was able to know/recall all of the details that he/she was asked about on direct examination.

Ask questions that demonstrate that any reasonable person would know the answer that the witness is claiming to not know.

Questions

Answers